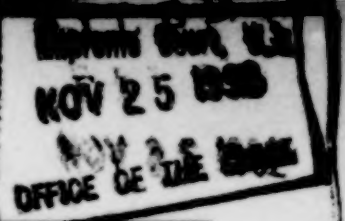


No. 92-1



IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LYNWOOD MOREAU, *et al.*,
Petitioners,
v.

JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED JUNE 29, 1992
CERTIORARI GRANTED OCTOBER 5, 1992



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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

H-88-1298

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
4/15/88	1	Complaint for Declaratory Judgment, Overtime Pay, Liquidated Damages and Other Relief Under the Fair Labor Standards Act
5/31/88	5	Defendants' Original Answer
4/11/89	11	Plaintiffs' Motion for Partial Summary Judgment
4/11/89	12	Memorandum in Support of Plaintiffs' Motion For Partial Summary Judgment
4/11/89	13	Statement of Facts Not in Dispute
6/8/89	16	Defendant's Motion for Summary Judgment Or Alternative Motion for Partial Summary Judgment
6/9/89	17	Defendants' Response to Plaintiffs' Motion For Partial Summary Judgment
6/9/89	18	Defendants' Statement of Facts
8/24/89	21	Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment and in Response to Plaintiff's Motion for Partial Summary Judgment
10/16/89	23	Plaintiffs' Response to Defendants' Motion for Summary Judgment
9/5/90	25	Memorandum & Order
9/5/90	26	Final Judgment
9/25/90	27	Plaintiff's Notice of Appeal

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case Number 90-2833

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/25/90	Notice of Appeal
1/11/91	Brief of Appellant
3/18/91	Brief of Appellee
4/1/91	Reply Brief of Appellant
2/4/92	Case Argued
3/31/92	Opinion Rendered

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Civil Action No. H-88-1298

EUGENE T. MERRITT, JR. Individually, as President of the Harris County Deputy Sheriff's Union, Local 154, IUPA, AFL-CIO, and as FLSA REPRESENTATIVE of 37 Consenting Similarly Situated Consenting Harris County Law Enforcement Officers; 706 Fawn Drive Houston, TX 77015

THE HARRIS COUNTY DEPUTY SHERIFF'S UNION, LOCAL 154 IUPA, AFL-CIO on its own behalf, and as an FLSA representative of the 400 Deputy Sheriffs it represents; 12751 Woodforest, Houston, TX 77015

HARRIS COUNTY SHERIFFS (CORPORAL AND SERGEANTS)

1. DANIEL ALMENDAREZ (Corporal)
428 Hoffman
Houston, TX 77020
2. L.V. MOREAU (Sergeant)
222 E. 2nd
Deer Park, TX 77536
3. THURMAN T. TYNDALL (Sergeant)
1509 Coolidge Drive
Deer Park, TX 77536

HARRIS COUNTY DEPUTY SHERIFFS

1. JERON MCNELL BARNETT SR.
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2. HUMBERTO RIOS BARRERA
2537 Priest
Houston, TX 77093

3. BRADLEY T. BENNETT
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Spring, TX 77373
4. ALTON W. BOWDOIN
62 Evanston #3
Houston, TX 77015
5. BRUCE BRECKENRIDGE
20070 N. Navaho Trail
Katy, TX 77449
6. CHUCK CALVIT
20127 Lions Gate
Humble, TX 77338
7. PAUL STEVEN CORDOVA
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Houston, TX 77060
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10. JAMES DEWEY
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28. R'WANDA SAMPSON
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29. MICHAEL WAYNE SIMPSON
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30. JAMES W. SIMS
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31. TERRY STOLITZA
3339 Maymist
Katy, TX 77449

32. WALTER L. WALKER
2475 Gray Falls Dr. #402
Houston, TX 77077

33. ROGER D. WEDGEWORTH
23210 Brightstar
Spring, TX 77373,

Plaintiffs,

v.

JOHNNY KLEVENHAGEN as Sheriff of
Harris County, Texas,
1301 Franklin Street
Houston, TX 77002

and

JUDGE JON LINDSAY
Commissioners Court
1001 Preston
9th Floor
Houston, TX 77002,

Defendants.

**COMPLAINT FOR DECLARATORY JUDGMENT,
OVERTIME PAY, LIQUIDATED DAMAGES AND OTHER
RELIEF UNDER THE FAIR LABOR STANDARDS ACT**

[Filed Apr. 15, 1988]

I. INTRODUCTION.

1. This action is brought by Eugene T. Merritt, Jr. individually, as President of the Harris County Deputy Sheriff's Union, Local 154, IUPA, AFL-CIO (hereafter Local 154) and as Fair Labor Standards Act (hereafter FLSA) representative of other consenting parties under FLSA Sec. 216, 29 U.S.C. Sec. 206(b); by 37 additional Harris County, Texas law enforcement officers; and by Local 154 on behalf of 400 deputy sheriffs and in the local union's capacity as FLSA representatives.

2. Plaintiffs bring this action for a declaratory judgment that the defendants have willfully and wrongfully violated their statutory obligations, and to recover back wages and liquidated damages in an equal amount from the Harris County Sheriff's Department for violations of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Sec. 201, *et seq.*

Defendants' violations include: the institution and operation of a compensatory time system after April 15, 1986, absent an agreement with the duly designated representative of employees involved; unilateral adjustments in the administrative regulations and application of rules

controlling plaintiffs' wages or fringe benefits; a failure to keep proper records as required by FLSA; failure to correctly calculate plaintiffs' "regular rates" of pay for the purposes of FLSA; failure to correctly calculate the FLSA "hours worked" of officers assigned to K-9, mounted, motorcycle, and other special duty units; failure to pay plaintiffs fully for training activities; failure to pay plaintiffs fully for travel time; failure to pay plaintiffs fully for standby time which cannot be used effectively for personal purposes; failure to pay plaintiffs fully for court time; and improper calculations for FLSA overtime entitlement.

II. JURISDICTION.

3. Jurisdiction of this action is conferred on this Court by U.S.C. Sec. 216(b) and 28 U.S.C. Secs. 1331, 1337. Declaratory relief is authorized under 28 U.S.C. Secs. 2201, 2202.

4. Venue for this action lies in this Court pursuant to 28 U.S.C. Sec. 1391(b).

III. PARTIES.

5. Each of the 37 individual plaintiffs is an adult resident citizen of Texas, employed as a law enforcement officer by the Sheriff's Department of Harris County, Texas. As shown by the written consent of each individual plaintiff attached to this Complaint as Exhibit A, each of the individual plaintiffs has consented to become a party in this cause pursuant to the provisions of 29 U.S.C. Sec. 203(e), and Sec. 206(b).

6. Plaintiff E.T. Merritt is a law enforcement officer employed by Harris County, is President of Local 154, and has been designated FLSA representative by the members of Local 154.

7. Local 154 is a fraternal, non-profit labor organization which represents law enforcement officers employed

by the Harris County Sheriff's Department in employment matters. Local 154 is the FLSA representative of 400 Harris County law enforcement officer members, including the 37 consenting plaintiffs.

8. Section 2 of the FLSA Amendments of 1985, 29 U.S.C. Sec. 207, for the first time gave representational status for FLSA purposes to organizations by requiring that a public agency may, in lieu of the otherwise mandated overtime compensation, pay its employees compensatory time off at a rate of not less than one and one-half for each hour of employment, but only under an agreement or understanding arrived at between the employee representative of the employees involved where such a representative has been designated. While not a formal or recognized bargaining agent, Local 154 has been designated by the 400 employees involved, and thus is a representative within the meaning of 29 U.S.C. Sec. 207(o)(2)(A) and 29 C.F.R. Sec. 553.23.

9. Defendant Johnny Klevenhagen is the Sheriff of Harris County, Texas.*

10. Defendant Harris County, Texas, is a political subdivision organized and existing under the laws of the State of Texas. Harris County is, and at all relevant times has been, the employer of each of the individual plaintiffs. The Harris County Sheriff's Department is the operating law enforcement agency of Harris County.**

11. The Harris County Sheriff's Department is an employer within the meaning of 29 U.S.C. Sec. 203(d).

12. No state or local law eliminates Harris County's authority to establish a compensatory time agreement under the FLSA and the United States Department of Labor, Wage and Hour Regulation, 29 C.F.R. Part 553,

* Serve at: 1301 Franklin Street, Houston, Texas 77002.

** Serve at: Jon Lindsay, 1001 Preston, 9th Floor, Houston, Texas 77002.

Vol. 51, No. 75, *Fed. Reg.* 13403, paragraph (2) under Summary of Rules (April 18, 1986).

IV. FACTS.

13. As set forth in each of the separate claims below, the defendants and their officers and agencies have violated, and continue to violate, the provisions of the FLSA by failing and refusing in a willful and intentional manner, since April, 1986, to pay plaintiffs, and their other employees similarly situated, wages due them under the FLSA and its implementing regulations. Defendants have further failed to keep records required by the FLSA.

14. The Fair Labor Standards Act was amended in 1974 to cover virtually all state and local government activities. Those amendments were challenged as unconstitutional, and in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the United States Supreme Court held them to be unconstitutional. On February 19, 1985, the Supreme Court reversed itself, and in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), held that the FLSA does apply to all state and local government employees. That decision had the immediate impact of rendering illegal many of the standing wage and hour policies of the Harris County Sheriff's Department, including its use of compensatory time, its calculation of overtime entitlement, and its record keeping.

15. On November 13, 1985, the Fair Labor Standards Amendments of 1985 (Pub. Law 99-150) were enacted. The amendments responded to many concerns raised in police administration by including special provisions in the FLSA which apply only to state and local employees.

16. During the period between the February, 1985, *Garcia* decision and April 15, 1986, wage and hour administration within the Harris County Sheriff's Department was confused.

17. Neither prior to nor during April, 1986, did the Harris County Sheriff's Department take all of the necessary steps to comply with the new amendments.

18. At no time prior to or since April, 1986, has the Harris County Sheriff's Department instituted a time and attendance record keeping system designed to record all work time within the meaning the FLSA.

19. Law enforcement officers within the Department devote "off the record" work time to the Department which the Department does not record. Informal arrangements are not rare.

20. The Department has unlawfully calculated the FLSA "regular rate."

21. The Department excludes from FLSA "hours worked" considerable numbers of hours it "suffers and permits," and in many cases mandates its officers assigned to K-9, mounted, motorcycle, and other similar duties to work.

22. The Department unlawfully excludes from FLSA "hours worked" certain travel time, court time, and training time, including certain firearms training. Exhibit B.

23. The Department has unilaterally imposed a system of compensatory time in lieu of overtime payments which is administered at the discretion of the Sheriff's Department. This system was designed and implemented without an agreement with the employees' designated representative Local 154.

24. Plaintiffs and plaintiffs' attorneys have outlined their objections to the Department's policies under FLSA. Plaintiffs have objected to the practices regarding compensatory time, exclusion of incentive pay from FLSA "regular rates" of pay, recordkeeping procedures, the exclusion from FLSA hours worked hours spent working

by officers assigned to K-9, mounted, motorcycle, and other similar duties, and other practices prohibited by FLSA. The Sheriff's Department has received copies of Department of Labor (DOL) opinions on the subjects of exemptions of Sergeants, Incentive Pay, and K-9 and Special Units. The Sheriff's Department has also been made aware of the series of cases (with no contrary authority) which have held similarly situated defendants in violation of FLSA and which have rejected arguments identical to those the Sheriff's Department has been making, and of a letter from the Legislative sponsors of the 1985 Wage and Hour Amendments to DOL Secretary Brock which unambiguously supports plaintiffs' position. Exhibits C and D.

25. The Sheriff's Department and the County have consistently refused to meet with plaintiffs' representatives. The County does not recognize any FLSA representatives of plaintiffs. In spite of extensive efforts to gain a cooperative solution to the problem, the defendants have indicated that they will not comply on these issues absent enforcement action.

26. On October 7, 1986, plaintiffs filed a Complaint regarding the above practices with the United States Department of Labor, Wage and Hour Division. This Complaint raised all the issues discussed herein. Exhibit E.

27. The United States Department of Labor investigators in Texas investigated the Complaint and reported their initial findings of violations of the FLSA to defendants and to the Department of Labor headquarters in Washington, D.C.

28. The Department of Labor case remains in an "action pending" status as of April 15, 1988, the second anniversary of the effective enforcement date of the FLSA 1985 Amendments.

CAUSE OF ACTION

29. The foregoing conduct of the defendants is in violation of the rights of the plaintiffs under the Fair Labor Standards Act of 1938, as amended.

V. RELIEF

WHEREFORE, the plaintiffs, pray that this Court:

A. Order defendants, under the supervision of plaintiffs' counsel or their designated agents or representatives, to make a complete and accurate accounting of all the overtime compensation due to each plaintiff;

B. Enter a declaratory judgment declaring that the defendants have willfully and wrongfully violated their statutory obligations and deprived the plaintiffs of their entitlement under the law, as alleged herein;

C. Enter a judgment under Section 216 of the FLSA against defendants for all sums found due to each plaintiff in overtime compensation;

D. Award each plaintiff monetary damages in the form of overtime compensation and liquidated damages equal to their unpaid overtime compensation plus interest;

E. Award plaintiffs their reasonable attorney's fees to be paid by defendants, and the costs and disbursements of this action; and

F. Grant such other relief as may be just and proper.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-88-1298

EUGENE T. MERRITT, JR., *et al.*,
Plaintiffs,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Defendants.

DEFENDANTS' ORIGINAL ANSWER

[Filed May 31, 1988]

Johnny Klevenhagen and Harris County, Texas, Defendants, file this their Original Answer to Plaintiffs' Original Complaint (the Complaint) and by way of such answer would show to the Court the following:

I.

INTRODUCTION

1. Defendants admit that Eugene T. Merritt, Jr. is the President of the Harris County Deputy Sheriff's Union, Local 154, IUPA, AFL-CIO. Defendants specifically deny that Mr. Merritt or the Harris County Deputy Sheriff's Union is the Fair Labor Standards Act Representative of other consenting parties under the Fair Labor Standards Act § 216, 29 U.S.C. § 206(b). Defendants specifically deny that Local 154 is the officially designated FLSA Representative of 400 deputy sheriffs as alleged, and/or that it can bring this action and act in the capacity as Fair Labor Standards Act Representative of these 400 unnamed deputy sheriffs.

2. Defendants admit that Plaintiffs seek a declaratory judgment and seek to recover back wages and liquidated damages, but deny that Plaintiffs are entitled to such relief. Defendants deny that they violated the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, and further deny that any of the alleged violations were either willful or wrongful. All remaining allegations in Paragraph No. 2 of the Complaint are denied.

II.

JURISDICTION

3. Defendants admit that this Court has jurisdiction of this action under 29 U.S.C. § 216(b) and 28 U.S.C. §§ 1331, 1337. Defendants also admit that declaratory relief is authorized under 28 U.S.C. §§ 2201, 2202, but deny Plaintiffs are entitled to such relief.

4. Defendants admit that venue for this action lies in this Court pursuant to 28 U.S.C. § 1391(b).

III.

PARTIES

5. Defendants admit that the 37 individuals listed as Plaintiffs are adult resident citizens of Texas and are employed as law enforcement officers by the Sheriff's Department of Harris County, Texas. Defendants also admit that Exhibit A, attached to the Complaint purports to state that each of these individuals has consented to become a party in this case. Defendants deny that these forms are a consent to become a party pursuant to provisions of 29 U.S.C. § 203(e) and § 206(b).

6. Defendants admit that Plaintiff E. T. Merritt is a law enforcement officer employed by Harris County and is the President of Local 154. Defendants deny the remaining allegations in Paragraph 6 of the Complaint.

7. Defendants admit that Local 154 is a labor organization, and that it purports to represent officers employed by the Harris County Sheriff's Department in employment matters. Defendants deny, however, that Local 154 is the only organization which purports to represent officers in such matters. Defendants deny that Local 154 is, for the period relevant to this action, the Fair Labor Standards Act Representative of the officers of the Harris County Sheriff's Department. Defendants are unable to admit or deny whether Local 154 has 400 Harris County law enforcement officer members including the 32 individual Plaintiffs. Defendants deny the remaining allegations in Paragraph 7 of the Complaint.

8. Defendants admit that Local 154 is not a formal or recognized bargaining agent. Defendants deny the remaining allegations in Paragraph 8 of the Complaint.

9. Defendants admit that Johnny Klevenhagen is the Sheriff of Harris County, Texas.

10. Defendants admit that Harris County, Texas, is a political subdivision organized and existing under the laws of the State of Texas. Defendants deny the remaining allegations in Paragraph 10 of the Complaint.

11. Defendants deny the allegations in Paragraph 11 of the Complaint.

12. Defendants admit the allegations in Paragraph 12 of the Complaint.

IV.

FACTS

13. Defendants deny the allegations in Paragraph 13 of the Complaint.

14. Defendants deny the allegations in Paragraph 14 of the Complaint.

15. Defendants admit the first sentence of Paragraph 15 of the Complaint. Defendants deny the remaining allegations in Paragraph 15 of the Complaint.

16. Defendants deny the allegations in Paragraph 16 of the Complaint.
17. Defendants deny the allegations in Paragraph 17 of the Complaint.
18. Defendants deny the allegations in Paragraph 18 of the Complaint.
19. Defendants deny the allegations in Paragraph 19 of the Complaint.
20. Defendants deny the allegations in Paragraph 20 of the Complaint.
21. Defendants deny the allegations in Paragraph 21 of the Complaint.
22. Defendants admit that it excludes from "hours worked" time spent in firearms requalification outlined in Exhibit B to Plaintiffs Complaint. Defendants deny the remaining allegations in Paragraph 22 of the Complaint.
23. Defendants deny the allegations in Paragraph 23 of the Complaint.
24. Defendants are without information to admit or deny the allegations in Paragraph 24 of the Complaint.
25. Defendants deny that the Sheriff's Department and the County have refused to meet with Local 154. Defendants admit that it does not recognize any organization as the "FLSA Representative of Plaintiffs." Defendants deny the remaining allegations in Paragraph 25 of the Complaint.
26. Defendants admit that Exhibit E to Plaintiffs' Complaint is a complaint to the Department of Labor, Wage and Hour Division. Defendants deny the remaining allegations in Paragraph 26 of the Plaintiffs' Complaint.
27. Defendants are without information to admit or deny the allegations in Paragraph 27 of the Complaint.

28. Defendants are without information to admit or deny the allegations in Paragraph 28 of the Complaint.

CAUSE OF ACTION

29. Defendants deny the allegations in Paragraph 29 of the Complaint.

V. Relief

Defendants deny that Plaintiffs are entitled to any of the relief requested in their Complaint.

FIRST AFFIRMATIVE DEFENSE

The allegations contained in Plaintiffs' Complaint are barred in whole or in part by laches.

SECOND AFFIRMATIVE DEFENSE

The allegations contained in Plaintiffs' Complaint are barred in whole or in part by limitations.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs by their actions have waived in whole or in part any complaint they may have under the Fair Labor Standards Act.

FOURTH AFFIRMATIVE DEFENSE

Defendants specifically deny that Plaintiffs Merritt and Local 154 or any of the other individual Defendants have the authority to sue in a representative capacity or on behalf of all members of Local 154. Local 154 is not a proper party plaintiff in this action.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that Plaintiffs' Original Complaint be dismissed, that Plaintiffs be denied all relief sought, that judgment be entered in favor of Defendants, that Defendants recover all costs of court and attorney's fees, and that De-

endants have such other and further relief to which they may show themselves justly entitled.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-88-1298

EUGENE T. MERRITT, JR., *et al.*,
Plaintiffs,

v.

JOHNNY KLEVENHAGEN, *et al.*,
Defendants.

STATEMENT OF FACTS NOT IN DISPUTE

[Filed Apr. 11, 1989]

I. JURISDICTION AND PARTIES

1. This court has jurisdiction of this action under 29 U.S.C. § 216(b) and 28 U.S.C. §§ 1331 and 1337. Declaratory relief is authorized under 28 U.S.C. §§ 2201 and 2202. Complaint Para. 3; Answer Para. 3.

2. Venue for this action lies in this Court pursuant to 28 U.S.C. § 1391(b). Complaint Para. 4; Answer Para. 4.

3. The 37 individual plaintiffs listed on the caption of the Complaint are adult resident citizens of Texas and are employed as law enforcement officers in the Harris County Sheriff's Department by Harris County, Texas. Exhibit A to plaintiffs' Complaint states that these individual plaintiffs consented to become parties in this case. Complaint Para. 5; Answer Para. 5.

4. On February 10, 1989, this court granted plaintiffs' Motion to join as plaintiffs an additional 76 officers,

all of whom are also adult resident citizens of Texas and are employed as law enforcement officers in the Harris County Sheriff's Department by Harris County, Texas. Filed with plaintiffs' Motion were consent forms for each of these additional plaintiffs, stating that each additional officer consented to become a party in this case.

5. Plaintiff E. T. Merritt is a law enforcement officer employed by Harris County and is the President of the Harris County Deputy Sheriff's Union, Local 154, AFL-CIO (Local 154). Complaint Para. 6; Answer Para. 6.

6. Local 154 is a labor organization which represents officers, including plaintiffs employed by the Harris County Sheriff's Department in employment matters. Complaint Para. 7; Answer Para. 7. Local 154, is not an exclusive collective bargaining agent.

7. In addition to Local 154, the following other employee organizations act as representatives of officers: the support union of the Harris County Sheriff's Union, Local 171; the Afro-American Sheriff Deputies League; and the Mexican-American Sheriff's Association. Defendants' Answer to Plaintiffs' Interrogatories, No. 20.

8. Defendant Johnny Klevenhagen is the Sheriff of Harris County, Texas. Complaint Para. 9; Answer Para. 9.

9. Defendant Harris County, Texas is a political subdivision organized under the laws of the state of Texas. Harris County is, and at all relevant times has been, the employer of each of the individual plaintiffs. The Harris County Sheriff's Department (Sheriff's Department) is the operating law enforcement agency of Harris County. Harris County is an employer within the meaning of 29 U.S.C. § 203(d).

10. No state or local law eliminates Harris County's authority to establish a compensatory time agreement under the Fair Labor Standards Act (FLSA) and the

United States Department of Labor Wage and Hour Regulation 29 C.F.R. Part 553, Vol. 51, No. 75 Fed. Reg. 13403; para. 2 under Summary of Rules (April 18, 1986). Complaint para. 12; Answer Para. 12.

II. COMPENSATORY TIME AND EMPLOYEE REPRESENTATION

11. The Sheriff's Department compensates plaintiffs pursuant to a pay system under which compensatory time off (comp time) may be used in lieu of cash for overtime. Harris County Personnel Regulations § 7.02 ("In lieu of payment for overtime work, compensatory time may be allowed").

12. Defendants have not selected an alternative pay period pursuant to FLSA § 7(k), and therefore plaintiffs are entitled to overtime compensation for each and every 7 day pay period in which they work over 40 hours. Defendants' Answer to Plaintiffs' Interrogatory 10.

13. Defendants' pay system which provides for comp time in lieu of cash overtime was instituted and has been maintained without an agreement or memorandum of understanding with Local 154.

14. Each plaintiff has designated Local 154 as his or her FLSA representative. Each plaintiff signed a consent form which contains the following paragraph: "I have authorized the Harris County Deputy Sheriff's Union to represent me in all FLSA matters." See Exhibit A to plaintiffs' Complaint.

15. Local 154 has acted as a representative for its members in employment matters including matters in which Harris County employs the plaintiffs, for over 5 years. It has had an arrangement with Harris County which provided for dues check-off for its members for over 5 years. Harris County and its officials have regularly worked with Local 154's leadership in situations in

which the local has represented its members with the Sheriff's Department.

16. Local 154, through its attorneys and/or officers, communicated its desire to reach an agreement concerning defendants' use of compensatory time to defendants and/or defendants' attorney, the County Attorney, in July 1986. See Exhibit E to plaintiffs' Complaint.

17. No such agreement has been reached with Local 154, and defendants do not have a comp time agreement with any organization. See Answer Para. 25.

18. Exhibit E to plaintiffs' Complaint is a Complaint to the Department of Labor, Wage and Hour Division, dated October 3, 1986. Complaint, Para. 26; Answer, Para. 26.

III. REGULAR RATE

19. In the calculation of plaintiffs' "regular rate" of pay (the base rates from which the time-and-one-half overtime rates are calculated), longevity pay is excluded. Defendants' Answer to Plaintiffs' Interrogatory 12(G).

20. Defendants do not award flight incentive pay.

IV. EXCLUSION OF WORK TIME

21. Defendant excludes from their calculations of the "hours worked" by plaintiffs time spent in firearms re-qualification as outlined in Exhibit B to plaintiffs' Complaint. Complaint Para. 22 and Exhibit B; Answer Para. 22.

22. Texas law requires law enforcement officers' firearms qualification once a year. Harris County Sheriffs, including plaintiffs, are required to qualify twice a year.

23. No plaintiff works with a dog, or is assigned to mounted patrol. Defendants' Answer to plaintiffs' Interrogatories 12(F) and (H).

Respectfully submitted,

/s/ Michael T. Leibig
MICHAEL T. LEIBIG

/s/ Joseph E. Slater
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-88-1298

EUGENE T. MERRITT, JR., *et al.*

v.

JOHNNY KLEVENHAGEN, *et al.*

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
OR ALTERNATIVE MOTION FOR PARTIAL
SUMMARY JUDGMENT**

[Filed Jun. 8, 1989]

COME NOW Defendants Sheriff Johnny Klevenhagen ("Sheriff") and Harris County, Texas ("County"), moving for summary judgment, or, in the alternative, moving for partial summary judgment, pursuant to Rule 56, Fed. R.Civ.Proc., on the following grounds:

(1) *Brief Statement of the Case.*—Plaintiff Harris County Deputy Sheriff's Union, Local 154, AFL-CIO ("Union"), joined by individual Harris County deputies sheriff ("individual plaintiffs"), bring this suit for declaratory judgment against Sheriff Johnny Klevenhagen and Harris County, Texas. The basis of this litigation is Plaintiffs' belief that they are not properly compensated for their individual overtime, pursuant to the 1985 amendments to 29 U.S.C. 207(o) (Pub. Law. 99-150).

(2) Plaintiffs' complaint has failed to state a claim upon which relief may be granted.

(a) Payment of overtime compensation at one and one-half times Plaintiffs' individual overtime hours as compensatory time off is authorized by the Code of Federal Regulations promulgated by the U.S. Department of

Labor. Payment of overtime compensation at one and one-half times Plaintiffs' individual regular pay rate, in cash, after the Plaintiff has accumulated 240 hours of compensatory time off also is authorized by the U.S. Department of Labor's interpretations contained in the Code of Federal Regulations.

(b) County's calculation of "regular rates" of pay for purposes of cash overtime payments is authorized under U.S. Department of Labor interpretations and case law.

(c) County does not exclude basic or remedial firearms training from hours worked.

(d) County's overtime compensation policy was properly enacted and agreed upon by Plaintiffs. The compensation policy was enacted in December, 1985 and published in its revised personnel regulations handbook—more than seven months prior to Union's generalized communication to Defendants' counsel (See Exhibit "1", attached Personnel Regulations, Dec. 3, 1985, attached hereto; see also Complaint, Exhibit "E" reference to communication made to Defendants' counsel on July 8, 1986, that Union "was willing to reach an agreement in accordance with F.L.S.A.") Employment agreements, incorporating the provisions of the December, 1985 personnel regulations handbook, properly were entered into between Defendants and individual plaintiffs; no Plaintiff identified himself, personally or by representative's specific identification, that individual plaintiffs sought an agreement for overtime paid in cash in lieu of compensatory time off cash payments. (See Exhibit "2", attached affidavit of Defendant Sheriff; Exhibit "3", attached affidavit of C. J. Hrachovy). Union's generalized attempt to bargain for its unnamed employees, without identification of those employees, is an attempt at collective bargaining; such collective bargaining is not allowed under Texas

statutes, unless and until certain steps have been taken by Union and Harris County voters.

(e) Individual plaintiffs have waived their right to complain of County's overtime compensation policy.

(f) Individual plaintiffs are barred by the two-year statute of limitations from asserting claims against Defendants for payment in cash in lieu of compensatory time off.

(g) Defendants are not liable for liquidated damages to individual plaintiffs, as their actions were taken in "good faith."

WHEREFORE, Defendants pray that their motion for summary judgment be granted in all things; or, in the alternative, that they have partial summary judgment against Plaintiffs.

Respectfully submitted,

Of Counsel:

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Harris County Attorney

/s/ Ann Hardy

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
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C.A. No. H-88-1298

EUGENE T. MERRITT, JR., *et al.*

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DEFENDANTS' STATEMENT OF FACTS

[Filed Jun. 9, 1989]

Comes now Defendants Sheriff Johnny Klevenhagen ("Sheriff") and Harris County, Texas ("County"), submitting this, their statement of facts which are not in dispute.

(1) Harris County, Texas is a political subdivision of the State of Texas.

(2) Johnny Klevenhagen is the elected, qualified and acting Sheriff of Harris County, Texas.

(3) Sheriff Klevenhagen has the power of appointment, under Texas statutes, or deputies sheriff serving in the jurisdiction of Harris County, Texas. Upon assuming office in January, 1985 and thereafter, Sheriff Klevenhagen appointed individual Plaintiffs as deputies sheriff.

(4) Sheriff Klevenhagen appoints deputies sheriff and has the formal control over such deputies sheriff, pursuant to Texas statutes.

(5) Sheriff Klevenhagen also is a "fee officer," under Texas statutes. Fees which the Sheriff collects are deposited into the Harris County treasury.

(6) Pursuant to Texas statutes, Harris County is required to pay compensation to deputies sheriff from Harris County funds.

(7) Harris County may not influence the selection of a particular deputy sheriff for appointment by the Sheriff.

(8) Harris County, through its Commissioners Court, is the budgetary authority for expenditures for elected officials, including the Sheriff. Appointments of deputies sheriff are approved by County as to availability of budgeted funds. The budgetary listing for funds allocated to the Sheriff is called "Sheriff's Department."

(9) Harris County has not entered into a collective bargaining agreement with any union, as no union has followed the procedures set forth in Texas statutes.

(10) Harris County, through its Commissioners Court, never was notified that particular deputies sheriff, by name, desired to enter into an agreement regarding the payment, in cash, for overtime hours accumulated.

(11) Effective December 7, 1985, Harris County re-enacted its overtime compensation policy. Under that policy for non-exempt employees (such as individual plaintiffs), all hours worked over 40 per week, after April 15, 1985, were calculated at the rate of one and one-half times per hour, up to and including 240 hours (called "banked hours.") Thereafter, under the policy, non-exempt employees could take compensatory time off, subject to approval by the employee's supervisor. Such compensatory time off is deducted from the "banked hours." (Motion for Summary Judgment, Exhibit "1", §§ 7.01, 9.04).

(12) Beginning with the payroll period of April 16, 1986, all hours worked over 40 hours per week and

accumulated over the banked 240 hours were calculated at the rate of one and one-half times per hour and paid in cash at the employee's regular rate, called "base pay" on County Auditor payroll compensation forms. (Motion for Summary Judgment, Exhibit "2", attachments).

(13) Each employee, including individual plaintiffs, signed the County Auditor payroll compensation forms. The forms contained the provision that the signature of the employee evidenced that he or she had read, understood and accepted the terms and conditions of employment, as recited on the form and in the Harris County personnel regulations. (Motion for Summary Judgment, Exhibit "2", attachments).

(14) Harris County does not, and has no authority to, require deputies sheriff to qualify in firearms.

(15) In addition to the Sheriff, Constables have law enforcement duties. Of the eight elected constables in Harris County, at least three maintain law enforcement patrols.

(16) Harris County does not pay flight incentive pay, as neither it nor the Sheriff operate helicopters or airplanes.

(17) Harris County compensates training during duty hours as regular hours worked. (Defendants' ans. interrogs.).

(18) Individual plaintiffs' duty assignments, during the relevant times material to this litigation, included patrol, jailor and bailiff assignments.

(19) Other groups which purport to speak for Harris County deputies sheriff have identified themselves as the Harris County Deputy Sheriff's Association; the Support Union of the Harris County Sheriff's Union, Local 171; the Afro-American Sheriff Deputies League; the Mexican-American Sheriff's Organization; and (with other county

employees) the American Federation of State, County and Municipal Employees. (Defendants' ans. interogs.).

Respectfully submitted,

Of Counsel:

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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
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DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT

[Filed Jun. 9, 1989]

COME NOW Defendants Sheriff Johnny Klevenhagen ("Sheriff") and Harris County, Texas ("County"), responding to Plaintiffs' Motion for Partial Summary Judgment, as follows:

Brief Statement of the Case

(1) Plaintiff Harris County Deputy Sheriff's Union, Local 154, AFL-CIO ("Union") is joined by individual Harris County deputies sheriff ("individual plaintiffs") for declaratory judgment against Sheriff Johnny Klevenhagen and Harris County, Texas. The basis of this litigation is Plaintiffs' belief that they are not properly compensated for their individual overtime, pursuant to the 1985 amendments to 29 U.S.C. § 207(o) (Pub. Law. 99-150). Plaintiffs have moved for partial summary judgment on several grounds: (1) Defendants' use of compensatory time without a proper 29 U.S.C. § 207(o) agreement; (2) Defendants' calculation of Plaintiffs' "regular rates" of pay for the purpose of computing overtime rates; and (3) Defendants' exclusion of those hours, from its hours worked calculations, which Plaintiffs spent in firearms training.

Response

(2) Payment of overtime compensation at one and one-half times individual plaintiffs' regular pay rate as compensatory time off is authorized by the Code of Federal Regulations promulgated by the U.S. Department of Labor. Payment of overtime compensation at one and one-half times individual plaintiffs' regular pay rate, in cash, after the individual plaintiff has accumulated 240 hours of compensatory time off also is authorized by the U.S. Department of Labor's interpretations contained in the Code of Federal Regulations. Longevity is not incentive pay and is properly is excluded from "regular rate."

(3) Plaintiff Union contends that: (1) Defendants policy of using compensatory time off and cash payments, after overtime of 240 hours are accumulated, was promulgated unilaterally after Union was designated as a representative of the individual plaintiffs; and (2) defendants have refused to bargain with Union as the individual plaintiffs' representative prior to instituting the overtime compensation policy. These contentions are not supported by the facts. Defendant County's overtime compensation policy was enacted in December, 1985 and published in its revised personnel regulations handbook—more than seven months prior to Union's generalized communication to Defendants' counsel (See Exhibit "1," Personnel Regulations, Dec. 3, 1985, attached to Defendants' Motion for Summary Judgment; see also Complaint, Exhibit "E" reference to communication made to Defendants' counsel on July 8, 1986, that Union "was willing to reach an agreement in accordance with F.L.S.A.") Employment agreements, incorporating the provisions of the December, 1985 personnel regulations handbook were entered into between Defendants and individual plaintiffs before work was begun and well before individual plaintiffs gave written authorization for Union to represent them. (See dates in Complaint Exhibit "A", Plaintiffs' individual "opt-in" authorization forms, and additional

authorization forms of additional plaintiffs attached to their Motion to File Consent Forms and to Add Plaintiffs)

(4) No individual plaintiff, personally or by representative, identified himself, by name, to Sheriff or others in County specifically to request that County's overtime compensatory time off and cash policy be recinded as to that Plaintiff in lieu of cash paid for overtime. By such actions, Plaintiffs have waived, and are barred by the two-year statute of limitations from asserting, their claims now.

(5) Time spent in basic certification and remedial firearms training courses offered at the Sheriff's Academy are not excluded from computations of overtime. Such courses are offered during duties' regular work hours.

(6) Defendants' actions were taken in "good faith," under the facts of this case.

Wherefore, Defendants pray that Plaintiffs' Motion for Partial Summary Judgment be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION FOR SUMMARY JUDGMENT
AND IN RESPONSE TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT

[Filed Aug. 24, 1989]

COME NOW Defendants Sheriff Johnny Klevenhagen ("Sheriff") and Harris County, Texas ("County"), filing their memorandum of law in support of their Motion for Summary Judgment and in response to Plaintiffs' Motion for Partial Summary Judgment.

(1) *Standard for granting of summary judgment.*—Pursuant to Rule 56, Fed.R.Civ.Proc., this court must grant summary judgment when there is no genuine issue of material fact upon which reasonable minds could differ. *Anderson v. Liberty Lobby, Inc.*, — U.S. —, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Rule 56 (c), Fed.R.Civ.Proc., "mandates entry to judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, — U.S. —, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The primary function of a motion for summary judgment, in the absence of disputed facts, is to show that one or more of the essential elements of a claim or defense is not in

doubt, "and that, as a result, judgment should be entered on the basis of pure legal considerations." *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (5th Cir. 1986).

Defendants contend that Plaintiffs have failed to meet their burden of proof and, because of this, Plaintiffs' Motion for Partial Summary Judgment should be granted. In addition, because Defendants have met their burden of proof, Defendants' Motion for Summary Judgment should be granted.

(2) *Texas Statutes.*—Defendant Harris County is a political subdivision of the state of Texas; Defendant Sheriff is the elected, qualified and acting Sheriff of Harris County.

Under Texas statutes, Harris County is prohibited from entering into a collective bargaining contract with any labor organization when that agreement concerns wages, hours or conditions of employment. Art. 5154c, § 1 Vernon's Tex.Rev.Civ.Stat. Ann. The statute further declares that it is against public policy for any official or group of officials to "recognize a labor organization as the bargaining agent for any groups of public employees." Art. 5154c, § 2, Vernon's Tex.Rev.Civ.Stat. Ann. Any contract entered into with a labor organization concerning wages, hours or conditions of employment are declared null and void. Art. 5154c, § 1, Vernon's Tex.Rev.Civ.Stat. Ann. The Act further defines "labor organization" as any organization or any agency or employee, representation committee or plan, "which exists for the purpose, in whole or in part, of dealing with one or more employers concerning . . . wages, rates of pay, hours of employment, or conditions of work." Art. 5154c, § 5, Vernon's Tex.Rev.Civ. Stat. Ann. It is Texas's public policy that the right of persons to work shall not be denied or abridged because of fact of membership or nonmembership in a labor union or labor organization. Art. 5154g, § 1, Vernon's Tex.Rev. Civ.Stat. Ann. The Act further prohibits the calling,

maintaining, participation in, aiding or abetting any strike or picketing which purpose is to compel, force or coerce any employer to recognize or bargain with any employee or group of employees. Art. 5154g, § 2. Texas allows a public employer to collectively bargain with a labor association or employee representative (employee representation committee or plan) concerning wages, rates of pay, or hours of employment, when: (1) the Act is adopted, after petition and approval of a majority of the voters of the political subdivision. Art. 5154c-1, §§ 3, 5, Vernon's Tex.Rev.Civ.Stat.Ann. Public employee strikes are prohibited under the statute. Art. 5154c-1, § 2(b)(2). No labor organization, including Plaintiff Union, has followed this procedure; therefore, the prohibitions of Art. 5154c are in effect in Harris County.

Excluding Plaintiff Union, Plaintiffs are deputies sheriff, having been reappointed to such positions by Defendant Sheriff Klevenhagen. Under Texas statutes, only a Sheriff has the power to appoint or hire, fire, assign, control and direct the day-to-day activities of his deputies. Tex.Local Gov.Code §§ 85.003, 151.002. Payment of those deputies, however, no longer comes from the monies collected as fees of office by the Sheriff. See former Art. 3912e-4a, Vernon's Rev.Tex.Civ.Stat.Ann. Pursuant to Texas statutes, payment of the deputies sheriff must come from the county's general fund, upon application of Sheriff to the county's governing body—the Commissioners' Court. Tex.Local Gov.Code §§ 151.001, 152.001. Because Commissioners' Court determines the county's budget, Tex.Local Gov.Code § 152.011, it must authorize the payment of appointed deputies sheriff. Tex.Local Gov.Code § 151.002. Commissioners' Court, however, may not "influence" the appointment of a particular person to a budget position so authorized by it. Tex.Local Gov.Code § 151.004. Commissioners' Court classifies, or groups, salaried positions in the County budget. Thus, a deputy sheriff assigned by the Sheriff to a particular budgeted

position is paid the salary for that pay slot. Tex.Local Gov.Code § 152.071.

After the Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1984), local governments, such as Harris County, were required to pay overtime to its employees engaged in traditional governmental functions, including police protection. Pursuant to congressional legislation, local governments were given until April 15, 1986, to determine their overtime policies. Pub.L. 99-150. The Department of Labor, however, did not publish its final regulations construing the application of the Fair Labor Standards Act ("FLSA") to local government employees until 1987. (See 52 Fed.R. 2012, effective Feb. 17, 1987). The regulations were made applicable to local government employees engaged in police protection.

In Harris County, however, there is no one "police department"; police functions at the county level are performed by eight elected constables, and their deputies, as well as the Sheriff, and his deputies. Art. 2.12, Tex. Code Crim.Proc. Thus, the Sheriff's deputies are not the County's employees, although Harris County must pay them. Pursuant to its statutory duty, Harris County re-enacted its overtime compensation policy, effective December 7, 1985 (See Def. Exhibit "1"). Under that policy, all hours worked over 40 per week, after April 15, 1986, were calculated at the rate of one and one-half times per hour worked over 40 per week, for an accumulation of 240 hours. Compensatory time off is deducted from the accumulated 240 hours. (Def. Exhibit "1" §§ 7.01, 9.04; Def. S.o.F. 11). After 240 hours of compensatory time off accrued, non-exempt employees are paid in cash for one and one-half times the hours over 240 worked at the employee's regular rate ("base pay"). (See Def. Exhibit "3"; Def. S.o.F. 11, 12).

(3) *Defendants' use of compensatory time under FLSA.*—There is no dispute between the parties that County is correct in the multiplication rate of one and one-half times hours worked or in its cash payments for overtime hours worked after 240 hours are accumulated. At issue, however, is whether Defendants are required to pay the accumulated 240 ("banked") hours in cash or compensatory time off.

Assuming that Plaintiff deputies sheriff are County employees, Plaintiffs contend that they are entitled to cash payment for overtime worked in lieu of compensatory time off, because Defendants failed to reach an agreement with them, via Plaintiff labor union. (Pl. S.o.F. 13) Plaintiffs contend that they designated the Harris County Deputy Sheriff's Union to represent them in all FLSA matters; in support of their statement, Plaintiffs cite Plaintiffs' Complaint Exhibit "A" (Pl. S.o.F. 14), which consists of consent forms signed by Plaintiffs from March 23, 1988 to April 1, 1988. Plaintiffs also contend that Plaintiff Union, through its attorneys, "communicated its desire to reach an agreement" about the use of compensatory time and that such communication was made to Defendants' attorney in July, 1986. See Plaintiffs' Complaint Exhibit "E", Pl. S.o.F. 16.

Defendants contend that the combination compensatory time off/cash payment policy was properly enacted and that the individual Plaintiffs agreed to it. Defendants contend that because the overtime policy was a re-enactment of prior County overtime policies, because the policies were effective prior to the work performed, and because Plaintiffs failed to notify Defendants of their appointment of any representative prior to the beginning of the work, Defendants' actions were and are proper as a "regular practice in effect on April 15, 1986." 29 U.S.C. § 207 (o) (2) (A) (ii). (See Def. Exhibit "1", Personnel Regulations effective Dec. 3, 1985; Def. Exhibit "3", pp. 6-7 [Plaintiff Merritt Change in Status and re-

appointment forms, signed and dated Feb. 1, 1986 and Jan. 1, 1985 respectively, to which Plaintiff Merritt agrees that the Personnel Regulations adopted govern "this employment"]).

Defendants further contend that prior to filing of this litigation Defendant Sheriff, the appointing elected official, never received any communication from any plaintiff that Plaintiff Union was designated to represent any particular plaintiff in reaching an agreement for overtime cash payments in lieu of compensatory time off. (See Def. Exhibit "2"; Def. S.o.F. 13) Likewise, and by way of example, payroll records of Plaintiff Merritt (who brings suit in his capacity as Plaintiff Union's president) do not contain any written notification that he sought an agreement to be paid cash in lieu of compensatory time off, or that he had designated anyone to represent him for that purpose. (See Def. Exhibit "3", p. 2) Plaintiff Merritt clearly had an opportunity to so designate each time he signed a Change in Status payroll form; that form specifically states the signer "read, understand(s) and accept(s) . . . the terms and conditions of this employment as recited above and personnel regulations adopted by the Commissioners' Court and changed from time to time."

Defendants respond further that several associations and/or unions purport to represent deputies sheriff, including Plaintiff Union, each claiming varying memberships. (Def. S.o.F. 19) As neither Defendant Sheriff nor the county auditor's payroll personnel were ever told by any individual Plaintiff or Union that he or she had appointed Plaintiff Union as his/her representative (until the consent forms were filed in 1988 as part of this litigation), Defendants cannot be faulted for failing to negotiate with that representative, especially when opportunity was given individual Plaintiffs when yearly payroll forms were signed.

Pursuant to 29 U.S.C. § 207(o) (2) A) (ii), a public agency may provide compensatory time off in lieu of

cash payments for overtime worked when the employee is not covered by a collective bargaining agreement, memorandum of understanding or any other agreement between the employing agency and the employee's representative, which agreement or understanding is made before the performance of work. Section 207(o)(2) further provides:

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii).

Thus, the date "before the performance of the work" is April 15, 1986.

An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay. In such case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who *fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay.* (emphasis added)

52 Fed. Reg. 2012, 2035 (Jan. 16, 1987); 29 CFR 553.23 at 295-296 (7-1-87 Edition)

Union attempts to circumvent the requirement that the individual Plaintiffs had to tell the Sheriff (or, at the least, the county auditor's payroll personnel) that time off in lieu of cash was not acceptable to them; and that such notification from the individual Plaintiffs should have been made before April 15, 1986 or when yearly payroll forms were signed. Union contends that its generalized attempt to bargain for its unnamed members, without identification of them, is authorized as the individual Plaintiffs' "representative."

What Union proposes, is to do indirectly that which it cannot do directly under Texas statutes. Union seeks recognition of Union as a collective bargaining association and seeks, in effect, collective bargaining, which is prohibited under Texas statutes unless voter approval is secured. Arts. 5154c, §§ 1, 2; 5154c-1, Vernon's Tex. Rev. Civ. Stat. Ann.; *Amalgamated Transit Union, Local Div. 1338 v. Dallas Public Transit Bd.*, 430 S.W.2d 107 (Tex. Civ. App.—Dallas 1968, ref., n.r.e.)

"Collective bargaining" has been defined as "settling disputes by negotiation between the employer and the representative of the employees," *United Construction Workers v. Haislip Baking Co.*, 223 F.2d 872 (4th Cir. 1955); "... an activity presupposing that the employees shall have an opportunity in absence of their employer to canvass their grievances, formulate their demands in common, and instruct an advocate who they believe will best press their suit," *NLRB v. Stow Mfg. Co.*, 217 F.2d 900, 904 (2d Cir. 1954). Collective bargaining "involves the right of members of an organization, either through a committee or representative, to confer with the employer, and to present their claims or grievances as to hours, wages . . . incident their employment, with the end view of arriving at a reasonable and amicable adjustment of such matters." *Yellow Cab Operating Co. v. Taxicab Drivers Local Union 889*, 35 F.Supp. 403, 412 (Okla. 1940). Collective bargaining "implies a mutual exchange of ideas, reasons, and grounds for approving or disapproving submitted propositions." *Yellow Cab, Id.* It is the method of settling disputes "by negotiation between employer and the representative of the employees." *United Construction Workers v. Haislip Baking Co.*, 223 F.2d at 877, citing *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed.2d 789 (1937).

Under Texas law, an association authorized to collectively bargain with a public employer is defined as "any organization of any kind, or any agency or employee

representation committee . . . and which exists for the purpose, in whole or in part, of dealing with one or more employers . . . concerning . . . wages, rates of pay, hours of employment. . . ." Art. 5154c-1 § 3 (4), Vernon's Tex. Rev.Civ.Stat.Ann.

In construing 29 CFR § 553.23, Department of Labor comments state that:

The Department recognizes that there is a wide variety of State law that may be pertinent to this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices.

52 Fed.Reg. 2012, 2014-15 (Jan. 16, 1987). Deferring to Texas law under these facts, it is clear that Union's "representation" is prohibited and that Defendants' overtime policy is proper.

In *Abbott v. City of Virginia Beach*, — F.2d — (4th Cir., July 19, 1989), 1989 WL 78709 [case below, 689 F.Supp. 600 (D.C. Va. 1988)], the Court of Appeals affirmed the trial court's decision that Virginia's statute prohibiting collective bargaining with employee representatives was not contrary to the Section 207 (o). Although Plaintiffs try to distinguish this case as not controlling for reason that Virginia has a constitutional prohibition (while Texas does not) against public employer collective bargaining, a careful reading of that well reasoned opinion shows it is on point. In *Abbott*, Virginia Beach enacted its compensatory time off policy on April 1, 1986; the city adopted its policy without reaching an agreement with two Plaintiff unions and 126 individual plaintiffs who claimed the unions to be their representatives. In affirming the trial court, the appellate court cited a Virginia Supreme Court decision in *Commonwealth v. County Bd. of Arlington County*, 232 S.E.2d 30 (1977). In that decision, the Virginia Supreme Court

said a county board and county school board could not recognize a labor union as the exclusive agent for public employees; further, the boards were not authorized under Virginia statutes or its constitution, to negotiate and enter into binding contracts with the labor organization concerning terms and conditions of employment. Turning next to the Secretary of Labor's comments contained in the Federal Register, the Fourth Court of Appeals cited the Secretary's "intention that the question of whether employees have a representative for purposes of FLSA section 7 (o) shall be determined in accordance with State or local law and practices." 52 Fed.Reg. 2012, 2014-15. Because Virginia statutes prohibited such recognition and negotiation, and because of the Secretary of Labor's comments to the regulations, the federal court of appeals held that 29 U.S.C. § 207 (o), authorized the city's adoption of its April 1 policy without an agreement with Plaintiff unions, before enactment or thereafter. In the case at bar, Harris County re-enacted its overtime policy, effective December, 1985; as in *Abbott*, Texas prohibits collective bargaining with a public employer, absent voter approval. *Amalgamated Transit Union, Local Div. 1338 v. Dallas Public Transit Bd.*, *supra*. The *Abbott* holding should be followed in this cause.

Plaintiffs cite four cases for the proposition that other courts have held in support of their position. These cases are: *International Association of Fire Fighters, Local 2203 v. West Adams County Fire Protection District*, — F.2d — (10th Cir. June, 1989), [case below, 28 WH Cas. 981 (D.C. Colo. 1988)]; *Jacksonville Prof. Fire Fighters Assoc., Local 2961, IAFF v. City of Jacksonville*, 685 F.Supp. 513 (E.D. N.C. 1987); *Dillard v. Harris*, 695 F.Supp. 565 (N.D. Ga. 1987); *Wilson v. City of Charlotte*, 702 F.Supp. 1232 (W.D. N.C. 1988). Each of these cases are factually distinguishable from the case at bar. In each case cited, and before the effective date of § 207 (o), plaintiffs notified their governmental employer that they wanted to negotiate a compensatory pay

package, and each plaintiff had signed petitions designating a union or union committee as their representative for that purpose. In this cause, no Plaintiff notified Defendant Sheriff or auditor payroll personnel of his rejection of the compensatory time off policy and no Plaintiff, at any time, signed and presented petitions to Defendant Sheriff, or auditor payroll personnel, designating Plaintiff Union (or anyone) as their representative to negotiate a compensatory time off policy.

In *West Adams*, Defendant District had a policy, since 1983, of compensatory time off, since 1983, which it reiterated in late 1985 and early 1986. In late 1985, Plaintiff union sent a letter and petition to the District's chief; in the signed petition, employees designated Plaintiff union as their representative to negotiate for compensatory time.

In *City of Jacksonville*, Plaintiff union president sent a letter and petition, signed by 32 firefighters, designating the union as their representative for compensatory time. The letter and signed petition were received by Defendant City's manager on March 17, 1986. The City adopted its compensatory time off policy on April 23, 1986, after the effective date of § 207 (o).

In *Dillard*, the Georgia Department of Human Resources adopted a compensatory time off policy, effective March 1, 1986. On April 14, 1986, employees at GRC (one of the hospitals covered by the overtime policy) delivered a signed petition designating GRC organizing committee and two individual plaintiffs as their representative for negotiations. That same date, two other petitions, signed by employees at two other hospitals (including three individual plaintiffs at each hospital) were forwarded to Defendant Department. These latter petitions, however, did not designate a representative. Because the plaintiffs' first signed petition designated (before April 15) a representative, the court held an agreement with the representative was required in lieu of

cash payments for overtime. The trial court also held that because the latter two signed petitions (of April 14) did not designate a representative, the court could not agree with Plaintiffs' contention that Defendant Department was required to pay cash in lieu of compensatory time off.

In *City of Charlotte*, up to 240 hours of accumulated overtime was "banked", effective March 24, 1986; before 1986, the city's policy was to use compensatory time off. Prior to the city's adoption of that policy, in December, 1985, Plaintiff Wilson wrote the chief of city's firefighter department that employees in the department had selected Plaintiff union as their representative for the purpose of discussing and entering into an agreement for use of compensatory time in lieu of overtime pay. Attached to Plaintiff Wilson's letter was a 14-page signed petition, designating the union as the employee's representative. Unlike the case at bar, plaintiffs in *City of Charlotte* had written the head of their department, enclosing a signed petition designating the union as their representative. In addition, the notification was several months prior to April 15, 1986, the date "before the performance of the work." In the case at bar, Plaintiffs did not notify their department head (the Sheriff) and did not sign a petition designating Union as their representative. Although Union's attorney wrote a letter to Defendants' legal counsel in July, 1986, Plaintiffs do not contend the letter was signed by the individual Plaintiffs and designated Union as their representative. In any event, the letter was written well after April 15, the date work began.

Thus, under the authorities cited above, Defendants' re-enacted compensatory time off policy constitutes a "regular practice," the agreement or understanding of which may be presumed to exist for the purposes of § 207 (o) and § 553.20.

Agreement form not required.—The agreement or understanding further is evidenced by the Harris County

personnel handbook (Def. Exhibit "1") and by way of example, the employee's signature to county auditor payroll forms (Def. Exhibit "3", pp. 6-7) in which the employee agrees to the personnel regulations (including the compensatory time off provisions). Although Plaintiffs' suggest a more formalized agreement, no specific form is required under the Labor Department's regulations, as long as record of it is kept. 52 Fed.Reg. 2012, 2035 (Jan. 16, 1987); 29 CFR § 553.23 at 295 (7-1-87 Edition) Auditor payroll forms reflect the number of hours worked per week, the number of overtime hours accrued, hours "banked" and hours taken as compensatory time off. (See Def. Exhibit "3", affidavit of C.J. Hrachovy) Coupled with the personnel regulations and other payroll forms referring to those regulations, these documents are sufficient to satisfy § 553.23.

(4) *Calculation of compensation.*—As stated above, payment of overtime compensation at one and one-half times individual plaintiffs' regular pay rate as compensatory time off is authorized.

Payment of overtime compensation at one and one-half times individual plaintiffs' regular pay rate, in cash, after the individual plaintiff has accumulated 240 hours of compensatory time off also is authorized. 29 CFR §§ 553.23 (a) (2), 553.26 (a)

At issue in this case is the inclusion of "longevity" in the calculation of the regular dollar rate by which overtime is paid. In other words, when deputy Y works overtime, his overtime hours are recognized and accrued on the payroll forms. For every overtime hour worked, it is multiplied by one and one-half with the product ("product hours") added to the "banked" hours. When deputy Y reaches a total of 240 hours, he is paid, in dollars, the number of product hours multiplied by his calculated hourly rate derived from his "base pay".

Plaintiffs contend that the base pay (or regular rate) should include "longevity" payments in the calculations

of hourly rate. Defendants contend "longevity" is properly excluded from the calculation of regular rate of pay under the "gift or similar payment" exemption. 29 U.S.C. § 207 (e) (1); 29 CFR § 778.212 (b) Section 207 (e) provides:

As used in this section "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to . . . the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts . . . as a reward for service, the amounts of which are not measured by or dependent on hours worked, production or efficiency.

"Regular rate" is not defined further in the regulations, 29 CFR § 553.233, although rules for computation are given. 29 CFR § 778.212. Under the regulations, the bonus payment must be in the nature of a gift. "If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift." 29 U.S.C. § 778.212 (b)

Longevity may be excluded from the regular rate of pay under section 207 (e) (1),

even though it is paid with regularity so that employees are led to expect it and even though the amounts paid to different employees . . . vary . . . according to their length of service with the firm so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency.

29 CFR 778.212 (c)

The federal regulations state that an amount paid for each five years of service "with the firm, for example, would be excludable from the regular rate under this category." *Id.*

In 1985, longevity payments were set at \$60 per year for each full year of service in Harris County government, payable in monthly installments during the County's fiscal year. The amount is determined by Commissioners' Court during the annual budgetary process; payments began with the first paycheck after January 1. For example, Plaintiff Merritt was awarded \$60, payable monthly, in longevity payments effective January 1, 1985; in 1986, the paid monthly amount was \$70; and in 1987, \$75 paid monthly. (See Def. Ex. 3, pages 5-7, auditor payroll forms) Because longevity payments are awarded solely on length of service and without regard to number of hours worked, productivity or efficiency standards, they are properly excluded from base pay (regular rate) hourly rates.

(5) *Firearms certification and remedial firearms training.*—Plaintiffs contend firearms training should be compensated as overtime cash payments. Basic certification or qualification occurs during the prospective deputy's initial training course which he must complete to meet state-imposed licensing criteria. These basic courses are offered throughout the state, including the University of Houston. When these courses are taken at these institutions, the prospective deputy obviously is on his own time. When taken through the Harris County Sheriff's Academy, the training and qualification are part of the regular school or work day for which the deputy is paid. 29 CFR § 553.226 (Def. S.o.F. 17) Harris County has no authority to require deputies sheriff to qualify in firearms to meet state annual firearms qualification requirements. (Def. S.o.F. 14) Deputies are required by Defendant Sheriff to qualify on a semi-annual basis. Deputies whose firearms score is less than 60 per cent are required to attend a remedial classroom and range sessions conducted during regular business hours at the Harris County Sheriff's Academy. During that period of time, the officer does not work at his regular assignment, but attends the Academy in lieu of that assignment. As his Academy sessions are not in addition to, but are in lieu of, his regular work

assignment, the deputy does not accrue overtime and is compensated at his base pay rate for a regular work day.

Federal regulations state that attendance outside regular working hours at specialized or follow-up training for certification, when required within a particular jurisdiction (by the county Sheriff), does not constitute compensable hours of work. 29 CFR § 553.227 (b) (1) Attendance outside of regular working hours at specialized or follow-up training for certification, required by a higher level of government (such as the State of Texas), does not constitute compensable hours of work. 29 CFR § 553.227 (b) (2) Even if costs are borne by the employer, such time is not compensable hours of work. 29 CFR § 553.227 (b) (3)

Under the regulations and the facts of this case, it is clear that qualification and remedial training are not included in calculations for compensable time; thus, no overtime compensation is due.

(6) *Statute of Limitations.*—Defendants have raised the affirmative defense of the two-year statute of limitations, barring that portion of Plaintiffs' claims, if any, arising more than two years before the date of filing this litigation on April 15, 1988. The two-year statute of limitations is applicable to actions brought under FLSA for unpaid overtime compensation or liquidated damages. 29 U.S.C. § 255 (a) Pursuit of administrative remedies does not toll the statute. *Aguilar v. Clayton*, 452 F.Supp. 896 (E.D. Okla. 1978)

Although the statute allows a three-year period for "willful" violations, that period is inapplicable under these facts. Prior to *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 1105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), local governments were not liable for cash overtime payments to employees involved in traditional governmental functions, such as law enforcement. *National League of Cities v. Usery*, 426 U.S. 883, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) In *Garcia*, the U.S. Supreme

Court held that the distinction between governmental and other functions was unworkable; therefore, local governmental units were subject to FLSA provisions governing overtime and minimum wages for those employees engaged in traditional governmental functions. In response to *Garcia*, Congress enacted Pub.L. 99-150. That statute provided that no political subdivision of a state is liable under 29 U.S.C. § 216 for a violation of 29 U.S.C. § 207 occurring before April 15, 1986. The amendments set forth in Pub.L. 99-150 took effect on April 15, 1986. The Department of Labor's regulations were not effective until February, 1987. These regulations were the guidelines by which local governments could determine how to apply 29 U.S.C. § 207 (o), enacted in response to *Garcia*. Under the regulations and § 207 (o), the combination overtime policy of compensatory time off and cash paid (after 240 hours accrued) was authorized as a prior, regular practice.

Thus, because of the Congressional intent that local governments are not liable for payment of overtime for the period ending April 14, 1986, and the fact that the Department of Labor had no regulations guiding local governments until 1987, the two year statute of limitations should apply.

(7) *Defendants acted in "good faith" and with reasonable belief.*—Plaintiffs seek liquidated damages pursuant to 29 U.S.C. § 216 (b). Defendants respond that liquidated damages should not be awarded if liability is found, because their actions were taken in good faith and with a reasonable belief their actions were proper. 29 U.S.C. § 260

Under the Portal-to-Portal Act, 29 U.S.C. § 260, the court "may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 [29 U.S.C. § 216]." It is the employer's burden of persuasion and proof that his actions were both in good faith and predicated upon such reasonable grounds that "it would be unfair to im-

pose upon him more than a compensatory verdict." *Barcelona v. Tiffany English Pub. Inc.*, 597 F.2d 464, 468 (5th Cir. 1979)

Liquidated damages should not be imposed for several reasons. First, Congress exempted local governments from liability for cash payments for overtime hours when there was a regular practice of compensatory time off in effect before April 15, 1986 (effective date of Pub.L. 99-150). Defendants' policy of using compensatory time off was re-enacted, effective December, 1985, before work began under the County's new fiscal year beginning in 1986.

In addition, until the filing of the consent forms attached to Plaintiffs' Original Complaint in 1988, no individual Plaintiff orally or in writing informed Defendants that he wanted to reach an agreement concerning the compensatory time-off policy. (See Def. Ex. 2, 3) As in *Abbott v. City of Virginia Beach*, — F.2d — (4th Cir., July 19, 1989), 1989 WL 78709, Texas statutes prohibits a County from collectively bargaining with a representative, unless and until other statutory requirements are met. Union's contention that it was acting as a "representative" is misleading in that neither the individual Plaintiffs or Plaintiff Union ever designated Union as a representative to Defendants to reach an agreement on each individual's behalf. In fact, Union states that by its legal counsel's letter in July, 1986, Union was acting for an unspecified group; acting on behalf of the group constitutes collective bargaining prohibited by Texas statutes.

Even if Union could be classed as a "representative", individual Plaintiffs' failure to designate, in writing (until this litigation) Union as the representative in each individual's behalf should not impose liability upon Defendants for liquidated damages. It is difficult to reach an agreement with any Plaintiff when he fails to step forward and voice his desire to enter into a different compensatory overtime arrangement.

As stated previously, Pub.L. 99-150 provided that local governments were not liable for cash payments if a prior, regular practice of compensatory time off was in place. The effective date of computation of overtime for cash payment purposes was April 15, 1986; however, the Department of Labor regulations construing the statute were not effective until February, 1987. During this interim period, local governments had no guidance other than the statute's language, which specifically provided that compensatory time off could be used in lieu of cash payments for overtime worked. Today, the regulations and the statute continue to allow such a policy. The court decisions construing § 207 (o) state compensatory time off is allowed. These later decisions have found local governmental liability only when the employees have each petitioned and designated a representative for a different policy prior to the enactment of the local government's compensatory time-off policy or before the work began. As stated in the discussion concerning Defendants' use of compensatory time (above), the facts of those judicial decisions, in other circuits, are distinguishable from those in this litigation and, because of those different facts, those decisions are inapplicable here.

WHEREFORE, Defendants pray that Plaintiffs' Motion for Partial Summary Judgment be denied and that their Motion for Summary Judgment be granted, in all things.

Respectfully submitted,

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